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No. 07-818

In the Supreme Court of the United States

ARMANDO NUNEZ, PETITIONER

v.

UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

The Government does not deny that the Seventh Circuit's analysis of appeal waivers conflicts with that of several other circuits. And while the Government contends that the decision here rested exclusively on an alternate ground, it concedes that the alternate ground was erroneous. Indeed, the Government itself suggests that certiorari should be granted and the decision vacated and remanded for consideration *without* the erroneous alternative holding.

Although petitioner would certainly appreciate the opportunity to reassert his claim before the Seventh Circuit, there is no reason to delay plenary review. The Seventh Circuit's view is abundantly clear. Its decision in this case explains in detail that a criminal defendant who has waived appeal as part of a plea agreement can no longer claim that his counsel's failure to file an appeal on demand violated his Sixth Amendment rights. Although the court ended its decision with an alternate holding—based on the plea agreement's waiver of collateral review—that fact has not stopped district courts from applying the decision below as binding in cases that do *not* involve waivers of collateral review. And if any doubt remained about this, the Seventh Circuit itself resolved it once and for all when it applied the decision below to deny relief in *Stephenson* v. *United States*, No. 06-2887 (7th Cir. Sept. 27, 2007), petition for cert. pending, No. 07-9267 (filed Dec. 26, 2007)—which involved *only* an appeal waiver and no waiver of collateral review.

The question presented in this petition is already ripe and appropriate for plenary review. Indeed, there is no reason to believe that the Seventh Circuit will change its mind on the question presented without this Court's guidance. The Court should grant

the petition in this case, either on its own or in combination with the petition in *Stephenson*. Alternatively, and at the very least, the Court should accept the Government's suggestion of granting certiorari and vacating and remanding the Seventh Circuit's decision for further consideration.

A. The decision below decisively sets forth the Seventh Circuit's approach to the appeal waiver issue and has been applied as binding precedent.

1. The decision below contains nine full paragraphs of discussion on why, in the presence of a plea agreement waiving an appeal, a defendant whose lawyer failed to file a notice of appeal when requested cannot claim that the lawyer was constitutionally ineffective. Pet. App. 3a-7a. This decision did *not* reserve judgment on the issue, as the Government suggests. Opp. 11-12. To be sure, the Seventh Circuit stated that it "need not decide whether [its] arguments are a sufficient response" to the approach of its sister circuits because of an additional factor—a waiver of the right to seek relief on collateral review. Pet. App. 7a. But with or without that additional factor, the Seventh Circuit left no doubt about its conclusion about the appeal waiver itself. Under such circumstances, plenary review is appropriate.

The Seventh Circuit flatly concluded that "[b]ecause the plea was voluntary, the waiver must be enforced. And that waiver knocks out Nunez's argument that his lawyer failed to follow his direction to file an appeal." Pet. App. 3a.[1] This is in direct con-

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[1] This paragraph's reference to an "illegally high sentence" as an exception to "the waiver" (Pet. App. 3a), reveals that "the waiver" that "knocked out" Nunez's claim was, in fact, the appeal waiver: an illegally high sentence was a stated exception to

flict with the approach followed by other circuits: namely, that under *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), a defendant is entitled to a new appeal if he asked his lawyer to file a notice of appeal and his lawyer failed to, regardless of whether an appeal waiver may bar some or even all arguments raised in that new appeal.

The Seventh Circuit also pronounced below that in a case involving an appeal waiver, a lawyer has a duty to refrain from what other circuits hold he *must* do: performing the ministerial task of filing a notice of appeal if the client unequivocally demands one. According to the Seventh Circuit, "[f]ar from having a ministerial duty to follow his client's (latest) wishes, a lawyer has a duty to the judiciary to avoid frivolous litigation—and an appeal in the teeth of a valid waiver is frivolous." Pet. App. 5a. The Seventh Circuit could not make its views much clearer. Indeed, the court characterized the rule of other circuits as "locat[ing] in the sixth amendment a rule that a lawyer is the client's puppet." Pet. App. 5a. That characterization of other circuits' reading of *Flores-Ortega* bespeaks more than "doubt": it is a definitive and strongly pejorative rejection.

Additionally, the decision below unequivocally announced that "the *Anders* [v. *California*, 386 U.S. 738 (1967),] procedure is required only when there is a right to appeal (and thus a right to have counsel act as an advocate *on* appeal). Nunez gave up his right to appeal, and with it the foundation for the *Anders* approach." Pet. App. 6a. This passage is directly contrary to the Second Circuit's decision in *Campusano* v. *United States*, which rested its reading of

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the appeal waiver but not to the collateral review waiver (see Opp. 10a).

Flores-Ortega in part on the potential value of the *Anders* procedure to a defendant who has ostensibly waived an appeal. See 442 F.3d 770, 774-75, 776-77 (2d Cir. 2006).

Then there is the broad statement that to the extent *Flores-Ortega* was based on the argument that "whether to appeal is a decision entrusted to the defendant personally," that principle is inapplicable where there is an appeal waiver. Pet. App. 7a. That is because, according to the Seventh Circuit, an appeal waiver means a defendant has already "made a personal decision—a decision not to appeal"—which he "has no right to countermand" later on by telling counsel to file a notice of appeal. Pet. App. 7a. This sweeping language can only mean that an attorney can and should ignore a client's command to file a notice of appeal if the client's guilty plea included an appeal waiver.

In short, the Seventh Circuit has set forth a lengthy and strongly worded discussion that leaves no doubt as to where it stands on the application of *Flores-Ortega* to a defendant whose plea agreement contains a waiver of the right to appeal. Whatever else the Seventh Circuit said, this discussion cannot help but have the force of binding law—and creates a sharp conflict in the circuits on the issue. All indications are that without guidance from this Court, the Seventh Circuit will not change its mind.

2. Lower courts in the Seventh Circuit have treated the decision below as controlling precedent on the effect of an appeal waiver, irrespective of any collateral review waiver. No lower court has yet adopted the Government's narrow reading.

In *Herrmann* v. *United States*, for example, the district court had initially followed other circuits' read-

ing of *Flores-Ortega* by granting an evidentiary hearing to the petitioner. No. 05-3277, 2007 WL 2700161 (C.D. Ill. Sept. 10, 2007). But it reversed course and cancelled the hearing based on the decision below in this case:

> The Seventh Circuit Court of Appeals . . . has now determined that a defendant does not receive ineffective assistance of counsel if: (1) the defendant has waived his right to file an appeal in his plea agreement, (2) the defendant instructs his attorney to file a notice of appeal anyway, and (3) the attorney fails or refuses to file a notice of appeal. . . . The decision in *Nunez* is controlling here. Herrmann waived his appeal rights in his plea agreement and then instructed his attorney to file a notice of appeal anyway. The attorney's refusal or failure to file the notice of appeal was effective assistance of counsel as a matter of law.

2007 WL 2700161, at *1. The district court did not note or rely on the presence of any waiver of collateral review.

The case of *Salas* v. *United States* involved a waiver of both collateral review and appeal, with language very similar to the plea agreement in this case. See No. 1:07-cv-417-DFH-WTL, 2007 WL 3286611 (S.D. Ind. Nov. 6, 2007). But *Salas* ultimately rejected the petitioner's ineffective assistance claim based not on the collateral review waiver, but on the waiver as a whole. It expressly relied on the discussion of appeal waivers in the decision below:

> As to Salas' claim that his attorney failed to file a notice of appeal, ... [w]ith the waiver provision of the Plea Agreement in place in

> Salas' case, . . . the recent ruling in *United States* v. *Nunez*, 495 F.3d 544 (7th Cir. 2007), renders this last contention of ineffective assistance unavailable. "Because the plea was voluntary, the waiver must be enforced. And that waiver knocks out Nunez's argument that his lawyer failed to follow his direction to file an appeal." *Id.* at 546. The basis of this view is that "there is no longer a right to appeal following a waiver." *Id.* at 547.

2007 WL 3286611, at *3. Again, the district court read the decision below to hold that an appeal waiver by itself bars any ineffective assistance claim on collateral review under *Flores-Ortega*.

These cases show beyond doubt that the Seventh Circuit's pronouncements on the effect of an appeal waiver are being applied as binding authority. Even now, defense lawyers in the Seventh Circuit are not required to file an appeal when their client demands it—if, in the lawyer's judgment, the appeal would be barred by a waiver of appeal in a plea agreement. The resulting conflict in the law requires this Court's intervention.

3. Even the Seventh Circuit itself has treated the decision below as controlling on the issue of the effect of an appeal waiver. The petitioner in *Stephenson* v. *United States*, No. 06-2887 (7th Cir. Sept. 27, 2007), petition for cert. pending, No. 07-9267 (filed Dec. 26, 2007), claims he asked his lawyer to file a notice of appeal after he pleaded guilty, and that the lawyer failed to do so. As the Government admits, Stephenson's plea agreement waived his right to appeal but not his right to collateral attack: the plea agreement contained "no collateral-attack waiver at all." Opp. 21. Under the reading the Government has asserted in its opposition to certiorari here, the Seventh Cir-

cuit's decision below in *Nunez* should not have controlled the result in *Stephenson*. Yet the Seventh Circuit in *Stephenson* asked for briefing on the effect of *Nunez*—and then summarily affirmed the denial of Stephenson's petition after receiving that briefing.

The Government's position in *Stephenson* before the Seventh Circuit was evidently quite contrary to what it has argued in this Court. Its position paper contended that the decision in this case controlled because "petitioner's claim fell outside the limited permissible exceptions to his appeal waiver." *Stephenson* Opp. 6. It also characterized the difference between appeal and collateral attack waivers as "slight differences in the language." *Ibid.*

Since then, the Government's position in *Stephenson* has taken a peculiar turn. Its opposition to certiorari in *Stephenson* now advances the supposition that the Seventh Circuit in that case must have "rest[ed] its holding on the same basis as its decision in *Nunez*, that is, that petitioner's waiver also gave up his right to file a collateral attack." *Stephenson* Opp. 8. In other words, the Government asks this Court to assume that the Seventh Circuit in Stephenson made a fundamental mistake about the facts of that case.

There are no signs of such a mistake. Rather, the most natural inference to draw is that that the Seventh Circuit simply applied as binding precedent the appeal waiver analysis found in the decision below here. After all, that is exactly what the Government asked it to do.

Judge Easterbrook, the author of the opinion below in this case, was also a member of the *Stephenson* panel. See *Stephenson* v. *United States*, 06-2887 (7th

Cir. Sept. 27, 2007) (unpublished order). In light of the focus on the collateral review waiver at the close of the opinion in *Nunez*, surely Judge Easterbrook as its author would have demurred from summary affirmance in *Stephenson* had he understood the decision below to require the presence of a collateral review waiver. His joinder in the *Stephenson* summary affirmance is inconsistent with the Government's limited reading of the decision below.

The Government concedes that the Court should vacate and remand because the decision below has been and may again be applied as "a precedential holding with broader ramifications." Opp. 21; *Stephenson* Opp. 10. That is true. Yet the Government also asks this Court to believe that the "broader ramifications" of the Seventh Circuit's holding extend only to the effect of pattern plea agreement language, not to the effect of an appeal waiver on counsel's obligations. This contention is belied by the fact that the lower courts, the Government before the Seventh Circuit in *Stephenson*, and (evidently) the Seventh Circuit itself in *Stephenson* all have agreed that the decision below establishes Seventh Circuit law on appeal waivers and ineffective assistance. There is no reason for this Court to wait for the Seventh Circuit to say so again before it grants plenary review to resolve the conflict among the circuits.

B. Even if the Government's reading were correct, the decision below would still conflict with those of other circuits.

Even if the decision below did turn on the waiver of collateral review, the Seventh Circuit still departed from the analysis of at least four other circuits on the correct scope of *Flores-Ortega*'s application. Those circuits remanded based on *Flores-Ortega* even

though the petitioners' plea agreements contained both appeal and collateral review waivers. See *United States* v. *Tapp*, 491 F.3d 263, 265-66 (5th Cir. 2007); *Campusano* v. *United States*, 442 F.3d 770, 772 n.1, 777 (2d Cir. 2006); *Gomez-Diaz* v. *United States*, 433 F.3d 788, 790, 792-93 (11th Cir. 2005); *United States* v. *Garrett*, 402 F.3d 1262, 1266-67 & n.5 (10th Cir. 2005).

The Fifth Circuit in *Tapp* explicitly rejected the notion that a collateral review waiver could have any greater effect than an appeal waiver where the petitioner's counsel had failed to honor an explicit request for a notice of appeal. *Tapp* joined the decisions in *Campusano*, *Gomez-Diaz*, and *Garrett*, which *Tapp* read correctly to hold that "the rule of *Flores-Ortega* applies even where a defendant has waived his right to direct appeal *and collateral review*." 491 F.3d at 266 (emphasis added).

All these cases involved waivers of collateral attack on the petitioners' sentences, much like Petitioner's. Opp. 13. Contrary to the Government's suggestion, there is nothing in these decisions suggesting they turned on any particular interpretation of the waiver's language.[2] And notwithstanding the pres-

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[2] The Tenth Circuit in *Garrett* granted relief in the face of an even broader collateral review waiver than Nunez's—it also covered challenges to Garrett's guilty plea—but the Tenth Circuit did not consider any possible effect of that waiver because the Government had not raised it. 402 F.3d at 1266 n.5. The Government concedes that it did not rely on the collateral review waiver in this case either, Opp. 15, 20, so the *sua sponte* analysis of collateral review waiver in the decision below is hardly consistent with *Garrett*. As to *Garrett*'s reference to the absence of any particularly relevant language in the collateral review waiver, Opp. 13-14, the Tenth Circuit appears to have pointed this out merely to emphasize the propriety of giving effect to the Government's issue waiver.

ence of a collateral review waiver in all four cases, all four decisions granted relief under *Flores-Ortega* in the form of an evidentiary hearing.

The Seventh Circuit denied petitioner the same relief that other circuits have granted under functionally identical facts. Thus, under any reading, the Seventh Circuit's decision has created a stark circuit split about the interaction between *Flores-Ortega* and plea agreement review waivers, even if the Government is correct that the reasoning below turned on the presence of a collateral review waiver rather than a waiver of appeal.

CONCLUSION

The petition for a writ of certiorari should be granted for plenary consideration, either on its own or in combination with the petition in *Stephenson*. Alternatively, the Court should grant both petitions for certiorari and vacate and remand for reconsideration in light of *Flores-Ortega* itself or, at a minimum, for reconsideration in light of the Government's position on the limited scope of the collateral review waiver.

Respectfully submitted.

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